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AD0021 & AS0022

ANTI-DUMPING AND ANTI-SUBSIDY INVESTIGATIONS CONCERNING IMPORTS OF OPTICAL FIBRE CABLES ORIGINATING IN THE PEOPLE'S REPUBLIC OF CHINA

Additional comments

by the

China Chamber of Commerce for Import and Export of Machinery and Electronic Products

19 May 2023

OPEN

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1 INTRODUCTION

1. This document provides the additional comments of the China Chamber of Commerce for Import and Export of Machinery and Electronic Products ("CCCME") in the context of the anti-dumping and anti-subsidy investigations concerning imports of single-mode optical fibre cables ("OFC") originating in the People's Republic of China (Investigations No. AD0021 and AS0022) initiated by the UK Trade Remedies Authority ("TRA") on 26 April 2022.

2. This submission incorporates by reference the initial comments submitted by the CCCME on 5 August 2022 ("AD Initial Comments" and "AS Initial Comments") and is based on the information available in the open file until 19 May 2023.[1]

2 PROCEDURAL OBSERVATIONS

2.1 Non-confidential summaries of key information still missing from the public file

3. In its Initial Comments,[2] the CCCME expressed its concerns regarding the extreme confidentiality of key information in the Application (*e.g.*, CRU estimates regarding the production of the UK OFC producers; the quantity, timing and level of trade of UK sales used to calculate the domestic unit prices; and data concerning the quantity of Chinese imports used to calculate the unit price of the imports). However, unfortunately, the requested non-confidential summaries have not been made available in the public file yet.

4. In addition, extreme confidentiality has been claimed by the Applicant in its ADQ/ASQ Replies in the absence of good cause demonstration. The responses to several questions have been completely redacted. For example, one questionnaire asks: "*[p]rovide a general description of any government regulations or tax incentives affecting the production or sale of the goods concerned and the like goods.*" The response to this question has been completely blanked out and a non-confidential summary has not been provided.[3] Likewise, non-confidential summaries of the domestic unit prices and the Applicant's costs of production have not been provided.

[1] Including the Application, the Applicant's Revised "AS0022 UK Producer Questionnaire OPEN" submitted on 9 February 2023, uploaded by the TRA to the public file on 22 February 2023 (hereinafter "ASQ Replies"); and the Applicant's "AD0021 Prysmian UK Group REVISED (Open version)" submitted on 7 February 2023, uploaded by the TRA to the public file on 22 February 2023 (hereinafter "ADQ Replies").
[2] CCCME's AD and AS Initial Comments of 5 August 2022, Section 2.1.
[3] Applicant's ADQ Replies, p. 23.

5. The CCCME recalls that – pursuant to Article 6.5.1 of the WTO Anti-Dumping Agreement ("ADA"), Article 12.4.1 of the WTO Agreement on Subsidies and Countervailing Measures ("SCMA"), and Regulation 45 of the Trade Remedies (Dumping ad Subsidisation) (EU Exit) Regulations 2019 ("basic Regulations") – interested parties submitting confidential information must mandatorily provide proper non-confidential summaries of the confidential information.[4]

6. In *China – X-Ray Equipment*, the Panel held that the statement "[Confidential]" in response to a question in a questionnaire reply failed to meet the requirement of Article 6.5.1 ADA, as it did not contain a summary of the substantive content of the relevant confidential information.[5]

7. The CCCME trusts that the TRA will require the Applicant to make the necessary non-confidential summaries available in the public file so that the CCCME and other interested parties can properly exercise their rights of defence.

2.2 Delays in making evidence available to the CCCME

8. The CCCME notes that the ADQ/ASQ Replies were supposedly filed on 5 August 2022. However, it appears that those "original" ADQ/ASQ Replies were not made available in the public file. Moreover, the "revised" versions of the ADQ/ASQ Replies were submitted to the TRA on 7 and 9 February 2023, respectively. However, these "revised" versions were made available in the public file only on 22 February 2023. This means that (i) the originally submitted ADQ and ASQ Replies are still not available in the public file nine months later and the first time that interested parties had access to the questionnaire responses of the Applicant was in February 2023 by way of the "revised" ADQ and ASQ Replies; (ii) 15 days elapsed between the date on which the revised ADQ Replies were submitted and they were uploaded to the public file; and (iii) 13 days elapsed between the date on which the revised ASQ Replies were submitted and they were uploaded to the public file.

9. The CCCME recalls that, pursuant to Article 6.1.2 ADA and Article 12.1.2 SCMA:

> "*Subject to the requirement to protect confidential information, evidence presented in writing by one interested Member or interested party shall be made available promptly to other interested Members or interested parties participating in the investigation*." (Underlining added).

[4] Panel Report, *Mexico – Olive Oil (DS341)* para 7.86; and Panel Report, *China – GOES (DS414)*, para 7.189. See also Regulations 45(1) and 45(3) of the UK basic Regulation.
[5] Panel Report, *China – X-Ray Equipment (DS425)*, para 7.350 and 7.357.

10. As noted by the Panel in *EU – Footwear (China)*, "*[t]he word "promptly" is defined as "in a prompt manner, without delay" and "[i]n a prompt manner; readily, quickly; at once, without delay; directly, forthwith, there and then.*"[6] In *Guatemala – Cement II*, a delay of 20 days in making a party's submission available to other parties participating in the proceeding was found to be inconsistent with Article 6.1.2 ADA.[7]

11. Based on the above, the CCCME respectfully submits that the failure to make the "original" ADQ and ASQ Replies available in the public file and the delays in making the "revised" responses available to interested parties could potentially constitute a breach of Article 6.1.2 ADA and Article 12.1.2 SCMA.[8]

2.3 Procedural issues arising from the inaccuracy of the injury data provided by the Applicant

12. Without prejudice to the above, the CCCME notes that there are multiple inconsistencies between the information provided in the Application, the information provided in Annex 12 to the Applicant's ADQ/ASQ Replies ("Injury Annex"),[9] and the information that can be discerned from the TRA's Verification Reports dated 12 January 2023. This is surprising given that (i) only the Applicant's (*i.e.*, Prysmian UK's) data was the basis of the claim of injury in the Application, and (ii) the periods and the product scope considered in the Application and in the Injury Annex are the same. In fact, in principle, the data provided by the Applicant in the Application and in its ADQ/ASQ Replies should have reflected the same facts and situation. Moreover, this puts into question adequacy and accuracy of the information in the Application, on the basis of which the present investigation was initiated in the first place.

13. To recall, Article 5.2 ADA and Article 11.2 SCMA *"[set] forth the evidence that must be included in an application for initiation submitted to an investigating authority by or on behalf of a domestic industry*." Article 5.3 ADA and Article 11.3 SCMA "*[require] an investigating*

[6] Panel Report, *EU – Footwear (China) (DS405)*, para. 7.583.
[7] Panel Report, *Guatemala – Cement II (DS156)*, para. 8.142, where the Panel held: "*Guatemala does not deny that Cementos Progreso's 19 December 1996 submission was not made available to Cruz Azul until 8 January 1997. Thus, there is no dispute between the parties that the Cementos Progreso submission was not made available to Cruz Azul until 20 days after its submission to the Ministry. In principle, we consider that a 20-day delay is inconsistent with the Ministry's Article 6.1.2 obligation to make this submission available to Cruz Azul "promptly*"."
[8] See, to this effect, Panel Report, *US – Softwood Lumber V (DS264)*, para. 7.137.
[9] It is noted that the "Injury Annex" seems to be available in the open AD file only. However, it is understood that the same injury data will be used for the purposes of the AD investigation and the AS investigation.

authority to review the accuracy and adequacy of the evidence in order to determine whether it is "sufficient" to justify initiation of an investigation."[10] Paragraph 9 of Schedule 4 to the UK Taxation (Cross-border Trade) Act 2018 ("TCBA"), and the UK basic Regulation 52 implement these requirements into UK law.

14. As explained by the Panel in *Pakistan – BOPP Film (UAE)*:

> "*The ordinary meaning of "accurate" includes "exact, precise; conforming exactly with the truth or with a given standard; free from error", and the ordinary meaning of "adequate" includes "fully satisfying what is required; quite sufficient, suitable, or acceptable in quality or quantity". Thus, the authority must examine whether the evidence is exact, precise, and suitable, acceptable*."[11]

15. In this case, in light of the information contained in the Injury Annex and the TRA's Verifications Reports, much of the injury data provided in the Application seems to be incorrect and imprecise, contrary to the requirements of Articles 5.2 and 5.3 ADA, Articles 11.2 and 11.3 SCMA and Regulation 52 basic Regulations.

16. In any event, as explained in Section 2.3.6 below, if the verification carried out at the Applicant's premises resulted in the correction of some data, the outcome of any comparison between the data contained in the Application and the verified data contained in Injury Annex should be explained by the TRA, so as to allow interested parties to understand the factual background of this case. This is particularly important in light of the fact that (i) it was the same company that provided the inconsistent and conflicting information (i.e., the Applicant) and (ii) the Application and the Injury Annex concern exactly the same period and product.

17. Such a clarification is important because, as will be explained below, the factual background of this case and the basis of the Applicant's allegation of injury are unclear, even though the present proceeding was initiated almost thirteen months ago.

18. Moreover, the information provided in the Injury Annex is also incomplete and does not allow the CCCME to gain a reasonable understanding of the situation of the Applicant because different units of measurement have been used to describe the trends of different injury factors.

[10] Panel Report, China – GOES (DS414), para 7.49.
[11] Panel Report, Pakistan – BOPP Film (UAE) (DS538), para 7.20.

19. These issues seriously undermine the CCCME's rights to defend its interests and may potentially result in a violation of Articles 6.2, 6.4, and 6.5.1 ADA; Articles 12.3 and 12.4.1 SCMA; as well as Regulation 45 basic Regulations.

2.3.1 Contradictory data regarding the Applicant's production

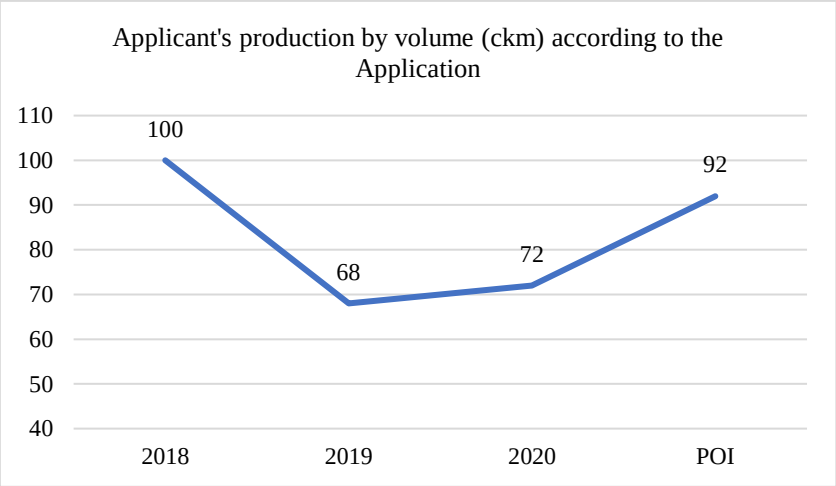
20. Although the CCCME is relying on indexed data, there seems to be a mismatch between the data regarding production provided in the Application, in the Injury Annex and in the TRA's Verification Report.

21. The Application contained the following information regarding the Applicant's production volumes:[12]

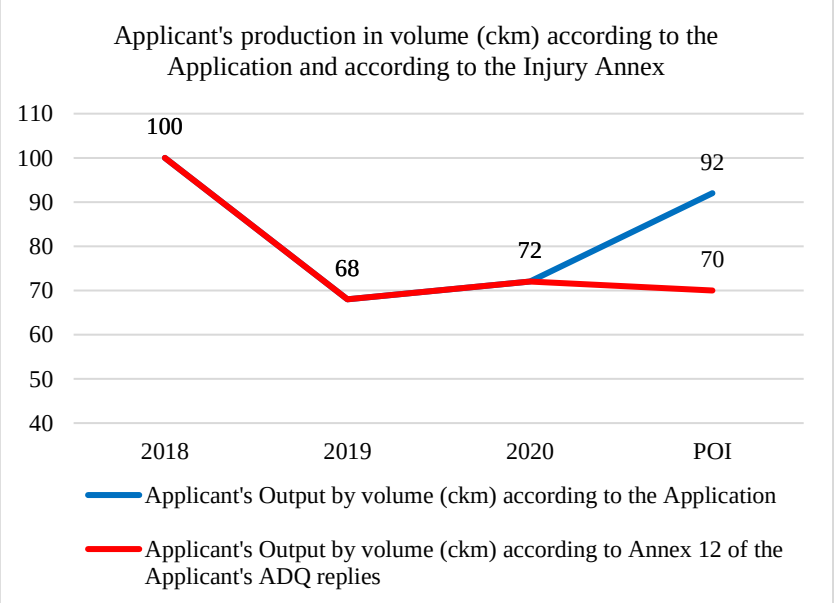
Table 6: Production, production capacity and utilisation of capacity of the Complaining UK Industry[433]

	2018	2019	2020	IP 2021
Complaining UK Industry Production volume (in ckm)	[40,000 - 45,000]	[27,000 - 32,000]	[27,000 - 32,000]	[37,000 – 42,000]
Index	100	68	72	92
Production capacity (in ckm)	[40,000 - 50,000]	[45,000 – 55,000]	[45,000 – 55,000]	[55,000 – 65,000]
Index	100	110	114	139
Production capacity utilisation (in %)	[90-100]%	[55-65]%	[55-65]%	[60-70]%
Index	100	62	63	67

[12] Application, p. 143.



22. The production information in the Injury Annex shows the opposite trend for the period of investigation ("POI").



23. In fact, while the Application shows that the Applicant's production volume substantially increased between 2019 and 2021, with an increase of 20% between 2020 and 2021, the Injury Annex shows that the Applicant's production declined by 2% between 2020 and the POI.

24. While this inconsistency, albeit substantial, remains unexplained, the TRA's Verification Reports state that "*in 2021, [the Applicant's] output by length grew*."[13] Therefore, in view of the

[13] TRA, "Verification Report – UK Producer – Case AS0022: Single-mode Optical Fibre Cables From China" of 12 January 2023 (hereinafter "AS Verification Report"), p. 14; and TRA, "Verification Report – UK Producer – Case AD0021: Single-mode Optical Fibre Cables From China" of 12 January 2023 (hereinafter "AD Verification Report"), p. 14.

conflicting information on the file, it is not clear whether the Applicant's output increased or decreased. Moreover, the conflicting information suggests that either the data in the Applicant's questionnaire response was incorrect, or the indexation of that data was incorrect – which would imply a violation of Article 6.5.1 ADA, Article 12.4.1 SCMA and Regulation 45 basic Regulations –,[14] or there is some other problem. Regardless, the underlying point remains that interested parties cannot exercise their rights of defence.

25. Furthermore, the CCCME notes that since the Applicant's production was the basis for calculating the Applicant's capacity utilisation rate, the inaccuracy of the Applicant's production data casts doubts on the capacity utilisation data in the Injury Annex as also the total UK OFC production and demand.

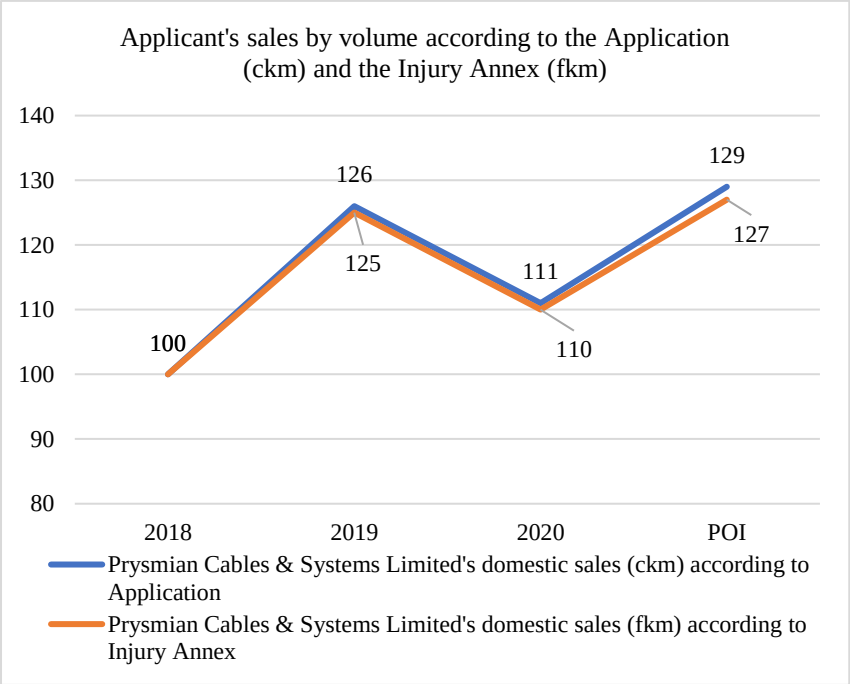
2.3.2 Conflicting data regarding sales

26. There seems to be another mismatch between the non-confidential summaries provided by the Applicant and the TRA's Verification Reports regarding the Applicant's sales volume.

27. Both the Application and the Injury Annex indicate that the volume of the Applicant's domestic sales developed positively over the injury investigation period ("IIP"), increasing by 27-29% between 2018 and 2021, and by 17-18% between 2020 and 2021.[15]

[14] As held by the Panel in *China – GOES*, a non-confidential summary is inadequate and deficient if there is a mismatch between the redacted information and the alleged summary. In fact, while a summary in the form of indexed data may be sufficient to enable a reasonable understanding of the information protected by confidentiality (depending on the circumstances of each case), a non-confidential summary containing incorrect indexed data will never satisfy the requirements of Article 6.5.1 ADA, Article 12.4.1 SCMA and UK basic Regulation 45. The provision of a summary containing incorrect data does not simply prevent interested parties from understanding the substance of the confidential information that the summary is meant to convey, but it effectively *misleads* them as to the substance of the confidential information – and thus misleads them also as to the grounds underlying the initiation and continuation of this the entire investigation. Please see Panel Report, *China – GOES (DS414)*, paras. 7.211 and 7.213.

[15] Application, p. 141; and Applicant's ADQ/ASQ Replies, Annex 12.

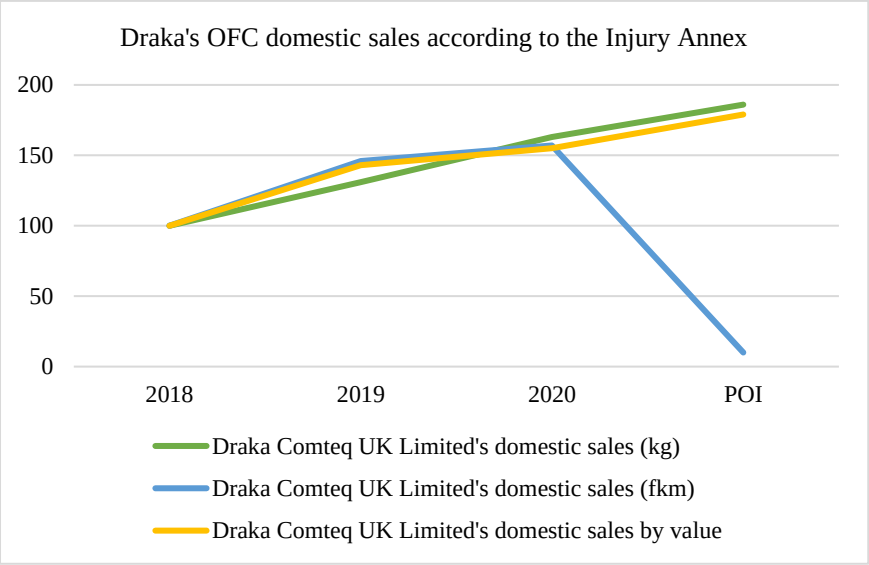


28. In contrast, the TRA's Verification Reports state that "*[b]ased on the verified data, the trend of sales of the like goods during the injury period was an increase in sales value and volume in 2019 relative to 2018, followed by a significant decline in 2020 and 2021*."[16]

29. This inconsistency adds to the questionability of the data and makes it impossible for interested parties to understand the basis of the injury claimed.

30. In addition, there seems to be further contradiction in the Injury Annex regarding Draka Comeeteq Limited's ("Draka") sales volume during the POI. Draka's domestic sales volume in fibre-kilometres ("fkm") increased by 57% between 2018 and 2020 and then allegedly decreased by 147% during the POI. However, the same data shows that Draka's domestic sales volume in kilograms ("kg") increased by 63% between 2018 and 2020 and further by 23% during the POI. As illustrated in the graph below, this positive trend is also reflected in Draka's sales value, which increased by 55% between 2018 and 2020 and by a further 24% during the POI.

[16] TRA, AS Verification Report, pp. 13-14; and TRA, AD Verification Report, pp. 13-14.



31. In fact, one would expect these indicators to roughly follow a similar trend, as is the case with the Applicant's domestic sales. This discrepancy, therefore, again puts into question the accuracy of the non-confidential information and, alternatively, the data itself.

2.3.3 Contradictory data regarding market share

32. The market share data also seems to be contradictory. This is likely the result of the data inconsistency concerning the Applicant's sales and production, and therefore, also the total UK consumption data.

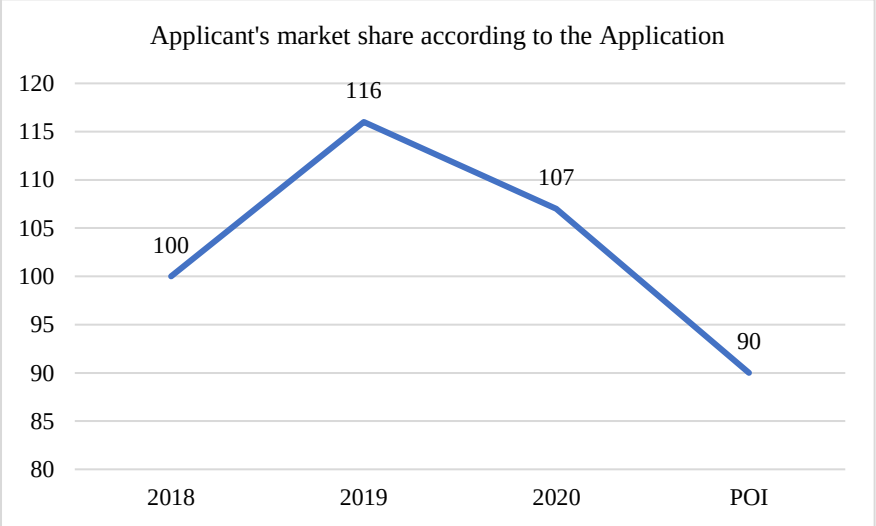
33. The Application contained the following data on market shares:[17]

Table 5: Estimated market shares of the product concerned[432]

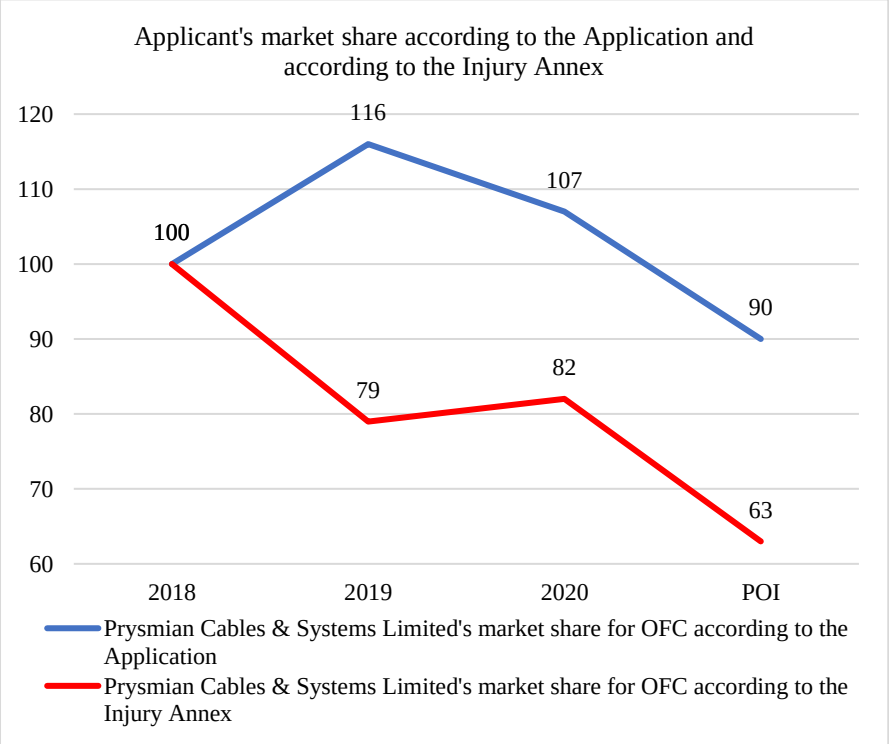
	2018	2019	2020	2021
Market share of all UK producers	48%	50%	50%	50%
Index	100	104	104	104
Market share of the Complaining UK Industry	[40-45]%	[45-50]%	[42-47]%	[35-40]%
Index	100	116	107	90
Market share of Chinese imports	4.3%	3.1%	4.2%	9.4%
Index	100	73	100	221
Market share of third country imports	47.7%	46.9%	45.8%	40.6%
Index	100	98	96	104

[17] Application, p. 142.

34. As the data above shows, according to the Application, the Applicant's market share decreased by 10% during the IIP.



35. In contrast, according to the Injury Annex, the Applicant's market share decreased by 37% during the IIP.



36. According to the TRA's Verification Reports, the "*market share estimate provided [by the Applicant] is complete and accurate. The trend shown by Prysmian UK is that it has lost a*

significant amount of market share over the injury period with only a slight recovery in market share in 2020."[18]

37. Nothing in the public file clarifies which set of data (if any) is correct. However, the TRA's Verification Reports suggest that the market share data provided in the Application was incorrect. This inconsistency, therefore, puts into question not only the market share of the Applicant but also that of all UK producers, the Chinese imports and of third country imports.

2.3.4 Unclear indexation of the data concerning return on investments

38. The indexation of Annex 13 of the Applicant's ADQ/ASQ Replies – and more specifically of the Applicant's data on return on investments – does not allow a meaningful understanding of the confidential data provided by the Applicant.[19] This is because it is not clear whether the Applicant's data on return on investments concerning OFC was indexed with reference to the Applicant's OFC-related investments, with reference to the Applicant's returns on investments concerning the whole company, or with reference to something else. It is thus not possible to understand this information.

39. In this connection, the CCCME recalls that, in *China – Broiler Products*, the Panel found that the non-confidential version of the Application did not comply with the requirements of Articles 6.5.1 ADA and 12.4.1 SCMA "*because providing year-over-year changes in percentage terms without a non-confidential summary of what constitutes the baseline does not allow a reasonable understanding of the magnitude of the change*."[20]

2.3.5 Use of different units of measurement to describe different injury factors

40. In the Injury Annex, the Applicant's data on sales and stock volumes are provided in kg and in fkm but not in cable-kilometres ("ckm"). This is questionable given that, in the Application, the Applicant claimed that ckm would be a more appropriate unit of measurement. This is also to be seen in the context of the facts that, in the Injury Annex, the Applicant's data on output, production capacity, and capacity utilisation are provided in ckm only.

[18] TRA, AS Verification Report, p. 14; and TRA, AD Verification Report, p. 14.
[19] It is noted that Annex 13 seems to be available in the open AD file only. However, it is understood that the data contained therein will be used for the purposes of both the AD investigation and the AS investigation.
[20] Panel Report, *China – Broiler Products (DS427)*, para. 7.63.

41. As explained in the Initial Comments, the CCCME considers the conversion from fkm to ckm to be unnecessary.[21] The Applicant seems to agree. However, the use of different units of measurement when providing data on different injury factors makes it impossible for the CCCME and other interested parties to gain a meaningful understanding of such data. Furthermore, by providing some injury data in fkm and others in ckm (and without providing the original data expressed in fkm) the Applicant seems to have provided an incomplete, and thus inaccurate, data set. Any possible finding of the TRA based on such a data set cannot be considered as being based on positive evidence and entailing an objective examination as required by Article 3.1 ADA and Article 15.1 SCMA.

42. The CCCME thus reiterates its concerns regarding the lack of transparency caused by the contradictory information in the public file. Clearly, (i) the non-confidential summarization provided by the Applicant regarding the injury factors does not comply with the requirements established under Article 6.5.1 ADA, Article 12.4.1 SCMA, and Regulation 45 basic Regulations. Therefore, it does not allow an understanding of the factual data underlying the injury claim thereby undermining the CCCME's rights of defence; (ii) at least based on the indexed data, the information and data provided by the Applicant do not seem to be correct or consistent.

2.3.6 Lack of "full opportunity" to exercise the rights of defence

43. As alluded to above, access to the complete data forming the basis of the allegation of injury and clarification as to why key injury data changed so drastically throughout the course of the present investigation – despite the fact that there was only one company providing the data for the same periods – is necessary to enable interested parties to defend their interests.

44. To recall, Article 6.2 ADA provides in the relevant part that, "*[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests*." (Underlining added).

45. In order for interested parties to have a "full opportunity" to defend their interests, they must necessarily be placed in a position to understand the factual basis of the claims made against them.

[21] CCCME's AS Initial Comments of 5 August 2022, Section 3.2.1; and CCCME's AD Initial Comments of 5 August 2022, Section 4.1.1.

46. Moreover, pursuant to Article 6.4 ADA and 12.3 SCMA:

> "*The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases, that is not confidential […], and that is used by the authorities in [an anti-dumping or countervailing] duty investigation, and to prepare presentations on the basis of this information*." (Underlining added)

47. It is well established that the "relevance" of information within the meaning of Article 6.4 ADA and Article 12.3 SCMA must be assessed from the perspective of the interested parties[22] and with reference to the issues under consideration.[23]

48. Furthermore, as explained by the Panel in *Guatemala – Cement II* and recently approved by the Panel in *EU – Cost Adjustment Methodologies* II (Russia), the obligation to provide "timely opportunities" to see all information falling within the scope of Article 12.3 SCMA requires providing "regular and routine" access to such information.[24]

49. In this connection, the CCCME also notes that the obligation to provide interested parties with "timely opportunities" to see the information relevant to the presentation of its case is not conditional upon receiving a request from an interested party.[25] This is because interested parties cannot request to see information that they may not know exists. However, to avoid any evidentiary difficulties, the CCCME hereby requests (i) a clarification of the factual basis of the Applicant's claim of injury and the reasons for the data changes and inconsistencies; as well as (ii) meaningful summaries of all the injury-related data and information provided by the Applicant and being relied upon/used by the TRA.

50. The CCCME also recalls that, as held by the Appellate Body, a failure to comply with the requirements of Article 6.4 ADA "*would necessarily entail a violation of Article 6.2 [ADA]*" in that:

> "*One of the stated objectives of the disclosure of information required under Article 6.4 is to allow interested parties "to prepare presentations on the basis of this information". The "presentations" referred to in Article 6.4, whether written or oral, logically are the principal mechanisms through which an exporter subject to an anti-dumping*

[22] Appellate Body Report, *EC – Tube or Pipe Fittings (DS219)*, para. 145; and Panel Report, *China – Broiler Products (Article 21.5) (DS427)*, para. 7.291.
[23] Panel Report, *EC – Salmon (Norway) (DS337)*, para. 7.769, cited with approval in Panel Report, *EU – Footwear (China) (DS405)*, para. 7.602; and Appellate Body Report, *EC – Fasteners (China) (DS397)*, para. 485.
[24] Panel Report, *Guatemala – Cement II (DS156)*, para. 8.133, cited with approval in Panel Report, *EU – Cost Adjustment Methodologies II (Russia) (DS494)*, para. 7.610.
[25] Panel Report, *China – Broiler Products (Article 21.5) (DS427)*, para. 7.291.

> *investigation can defend its interests. Thus, by failing to disclose Exhibit EC-12 and thereby depriving the Brazilian exporter of an opportunity to present its defence, the European Communities did not act consistently with Article 6.2.*" [26]

2.4 Unclear definition of UK OFC industry

51. The information available in the public file does not make clear which UK producer/s of OFC is/are included in the definition of the "UK industry" within the meaning of Paragraph 6, Schedule 4, TCBA.

52. This is because the Application contains data on sales and market share concerning both the "complaining industry" (*i.e.*, the Applicant) and "all UK producers of OFC", Moreover, in its ADQ/ASQ Replies, the Applicant acknowledged that "*the UK market is extremely competitive*" and that there are "*several producers*" of OFC in the UK.[27] However, no other UK producer seems to be actively participating in the present proceeding.

53. The CCCME, therefore, respectfully requests the TRA to clarify the definition of the UK industry for the purposes of the present proceeding.

3 SUBSTANTIVE COMMENTS ON THE APPLICANT'S CLAIM OF INJURY

3.1 The injury data provided by the Applicant does not constitute "positive evidence" and cannot form the basis of an "objective examination"

54. As explained in Section 2.3 above, the non-confidential summaries of the injury data provided by the Applicant at different points in time in different submissions seem to incomplete, and inconsistent. Such data cannot constitute "positive evidence" and cannot form the basis for an "objective examination" within the meaning of Article 3.1 ADA and Article 15.1 SCMA.

55. To recall, pursuant to Article 3.1 ADA and Article 15.1 SCMA:

> "*A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products*." (Underlining added).

[26] Appellate Body Report, *EC – Tube or Pipe Fittings (DS219)*, para. 149.
[27] Applicant's ADQ Replies, p. 21; and Applicant's ASQ Replies, p. 23.

56. The term "positive evidence" relates "*to the quality of the evidence that authorities may rely upon in making a determination*" and the word "positive" means that "*the evidence must be of an affirmative, objective and verifiable character, and that it must be credible*."[28]

57. The term "objective examination", on the other hand, "*is concerned with the investigative process itself*," *i.e.*, with "*the way in which the evidence is gathered, inquired into and, subsequently, evaluated.*" [29] In order to qualify as "objective", the investigation process "*must conform to the dictates of the basic principles of good faith and fundamental fairness*" and be conducted "*in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation*."[30] Moreover, as clarified in a string of WTO reports, to conduct an objective examination, "*the authority must take into account conflicting evidence and plausible explanations that may contradict its own hypotheses*."[31]

58. Further, as confirmed by the Appellate Body, Article 3.1 ADA and Article 15.1 SCMA lay down the overarching principle underlying all aspects of an injury determination:

> "*Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs. These obligations concern the determination of the volume of dumped imports, and their effect on prices (Article 3.2 [ADA]), investigations of imports from more than one country (Article 3.3 [ADA]), the impact of dumped imports on the domestic industry (Article 3.4 [ADA]), causality between dumped imports and injury (Article 3.5 [ADA]), the assessment of the domestic production of the like product (Article 3.6 [ADA]), and the determination of the threat of material injury (Articles 3.7 and 3.8 [ADA]). The focus of Article 3 is thus on substantive obligations that a Member must fulfil in making an injury determination*."[32] (Underlining added).

59. Against this background, the CCCME wishes to make two points.

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[28] Appellate Body Report, *US – Hot-Rolled Steel (DS184)*, para. 192. See also: Appellate Body Report, *China – GOES (DS414)*, para. 126; Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia) (DS578)*, para. 7.191; and Panel Report, *EC and Certain Member States – Large Civil Aircraft (DS316)*, para. 7.2079.

[29] Appellate Body Report, *US – Hot-Rolled Steel (DS184)*, para. 193. See also: Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia) (DS578)*, para. 7.192.

[30] Appellate Body Report, *US – Hot-Rolled Steel (DS184)*, para. 193. See also: Appellate Body Report, *China – GOES (DS414)*, para. 126; and Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia) (DS578)*, para. 7.192.

[31] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia) (DS578)*, para. 7.192, quoting Panel Report, *Pakistan – BOPP Film (UAE) (DS538)*, para. 7.258; and Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 - Canada) (DS277)*, para. 97.

[32] Appellate Body Report, *Thailand – H-Beams (DS122)*, para. 106. See also: Appellate Body Report, *Korea – Pneumatic Valves (DS504)*, para 5.168.

60. First, as demonstrated in Section 2.3 above, the Applicant's data regarding production volume, sales volume, market share, capacity utilisation -- and likely the total UK consumption -- provided in the Application, in the Injury Annex and in the TRA's Verification Report do not match. This implies that the data on these key injury factors which have thus far formed the basis of the Applicant's claim of injury, are *prima facie* unreliable unless of course the problem is limited to indexing errors, which would then imply a violation of Article 6.5.1 ADA and Article 12.4.1 SCMA.

61. Indeed, the conflicting non-confidential information affects the overall credibility of the data submitted by the Applicant and also casts doubt as to whether the underlying confidential data can be considered "affirmative, objective, verifiable, and credible".

62. Second, even assuming that the injury data provided by the Applicant could constitute positive evidence (*quod non*), the use of different units of measurement with respect to the injury factors is again inconsistent with the positive evidence requirement.

63. The CCCME recalls that "*the requirements to base a determination of injury on positive evidence and pursuant to an objective examination impose certain obligations on investigating authorities with regard to the completeness of the data used as the basis for their determinations*."[33] Indeed, according to WTO jurisprudence, an examination can only be "objective" if it is based on data "*which provide an accurate and unbiased picture of what it is that one is examining*."[34]

64. The fact that the Applicant used different units of measurement in the Injury Annex makes it impossible to obtain an accurate picture of the situation of the Applicant. This is not only because the use of different units of measurement renders the set of data provided by the Applicant incomplete (*i.e.*, some data is provided in ckm only and other data is provided in kg and fkm only) but also because it is not possible to evaluate the injury factors "*in context and in connection with one another*."[35]

[33] Panel Report, *Mexico – Olive Oil (DS341)*, para. 7.266, citing Panel Report, *Mexico – Anti-Dumping Measures on Rice (DS295)*, para. 7.79, upheld by Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice (DS295)*, para. 180.
[34] Panel Report, *Mexico – Olive Oil (DS341)*, para. 7.255. See also: Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice (DS295)*, para. 180.
[35] See, for example, Panel Report, *Korea – Certain Paper (DS312)*, para. 7.268.

3.2 The injury data in the public file does not support the Applicant's injury claim

65. Without prejudice to the above, it is noted that the data available in the public file does not support the Applicant's claim of injury.

66. To recall, pursuant to Regulation 33 basic Regulations:

> "*In considering […] the consequent impact of the dumped goods or subsidised imports on a UK industry, the TRA must take into account all relevant economic factors and indices having a bearing on the UK industry including:*
> *(a) actual and potential decline in sales, profits, output, market share, productivity, return on investments or utilisation of capacity;*
> *(b) factors affecting domestic prices of the like goods;*
> *(c) in the case of dumping, the magnitude of the margin of dumping;*
> *(d) actual and potential negative effects on cash flow, inventories, employment, wages, growth, the ability to raise capital or investments*."

67. Regulation 33 basic Regulations seemingly transposes Article 3.4 ADA and Article 15.4 SCMA.

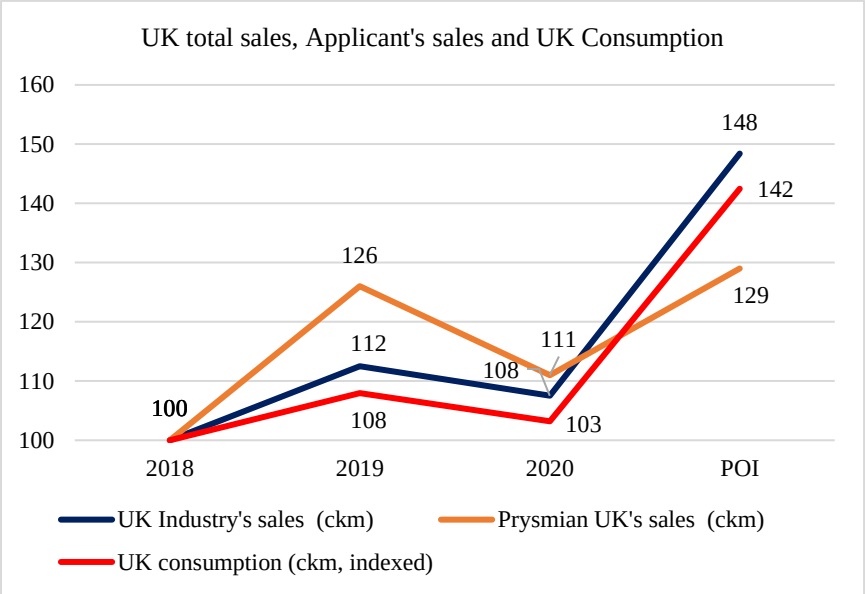
68. According to WTO jurisprudence, the examination of the impact of the dumped and subsidised imports on the domestic industry pursuant to Article 3.4 ADA and Article 15.4 SCMA "*requires an examination of the 'explanatory force' of subject imports for the state of the domestic industry.*"[36] (Underlining added).

69. As demonstrated below, in the present case, the Chinese OFC imports were not the explanatory force for any injury suffered by the Applicant in the IIP.

3.2.1 Sales volume and value

70. First, the Application makes clear that the OFC sales of all UK producers followed the same trend as the UK consumption and increased at a faster rate than the UK demand. Seen in this context, and as illustrated in the graph below, it was only the Applicant's sales that did not increase at the same rate as the UK consumption during the POI.

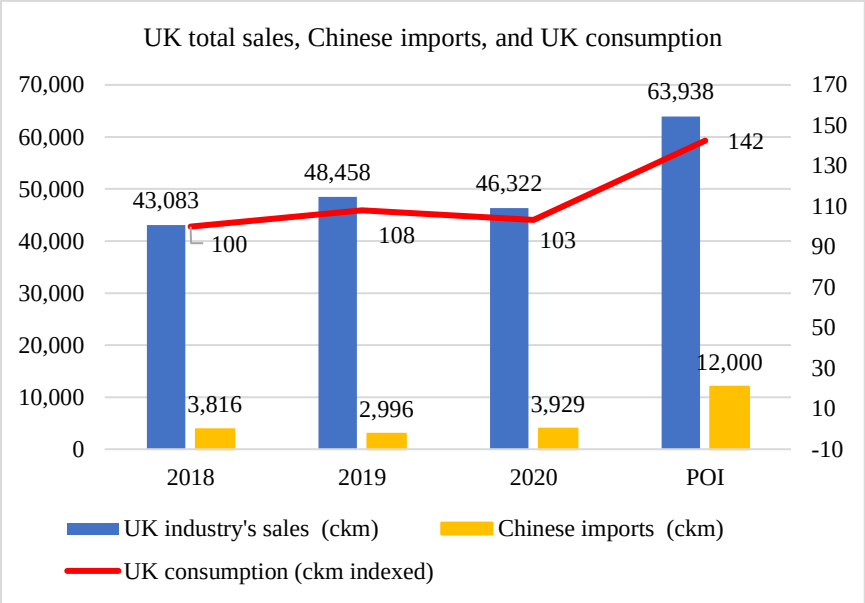
[36] Appellate Body Report, *Korea – Pneumatic Valves (DS504)*, para. 5.166, citing Appellate Body Report, *China – GOES (DS414)*, paras. 149-150; and Appellate Body Reports, *China – HP-SSST (Japan) (DS454) / China – HP-SSST (EU) (DS460)*, para. 5.205.



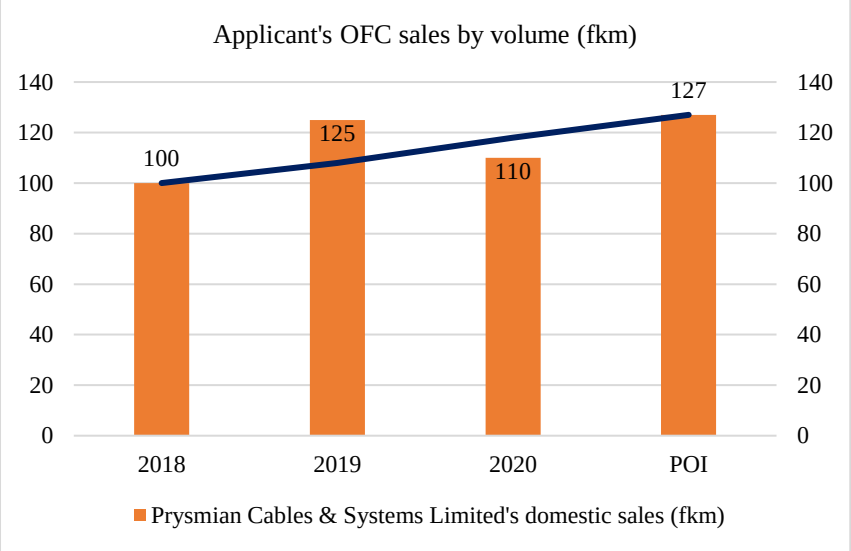
71. Thus, contrary to the Applicant's unsubstantiated assertions in the questionnaire replies, the UK market is clearly not "*suffering serious injury*."[37]

72. Second, as illustrated in the graph below, the Chinese OFC imports remained considerably smaller in volume compared to the UK producers' sales volumes. Moreover, the claim of a dramatic increase in OFC imports from China is not positive evidence when, in fact, the base figures for calculating the increase are very low. Since the Chinese import volumes were low at the beginning of the IIP, the CCCME respectfully submits that, in the present case, absolute numbers are much more relevant compared to relative numbers.

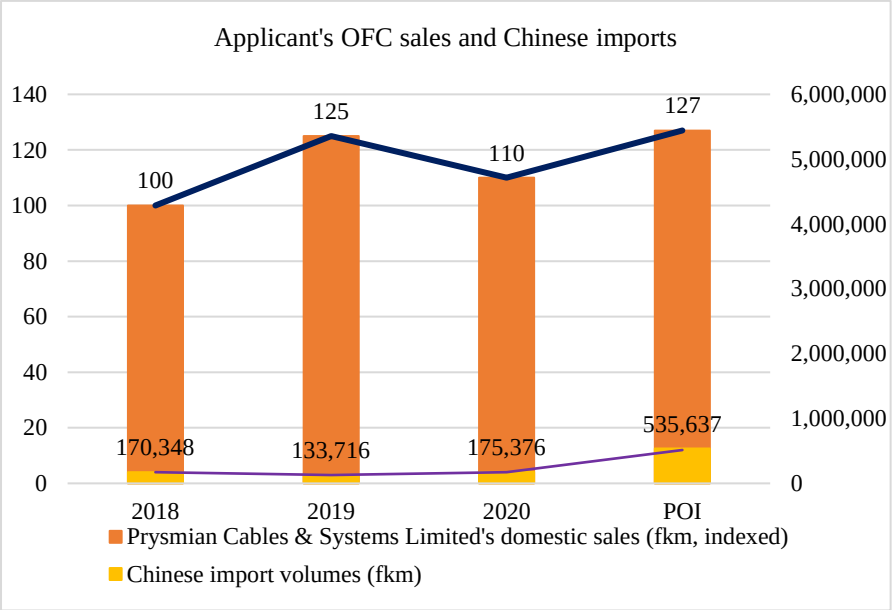
[37] Applicant's ADQ Replies, p. 21; and Applicant's ASQ Replies, p. 23.



73. Third, if the data provided in the Injury Annex is correct, the Applicant's sales volumes increased by 27% during the IIP and notwithstanding the Chinese OFC imports.



74. Moreover, a consideration of the intervening trends shows that the Applicant's sales declined only in 2020, *i.e.*, when in fact the Chinese imports were low, and the COVID-19 pandemic spread across Europe. Indeed, in 2020, the Applicant's export sales also declined drastically indicating that sales were affected globally by the COVID-19 pandemic. The Applicant's UK sales increased by 17% between 2020 and 2021, *i.e.*, when the Chinese imports of OFC allegedly increased. Thus, clearly it was COVID and not the Chinese OFC imports that impacted the Applicant's sales.



75. Indeed, there is no correlation between the decline in the Applicant's sales and the alleged increase in Chinese import volumes and this also clearly puts into question the explanatory force of the Chinese OFC imports alleged by the Applicant.

76. Fourth, as can be seen from the graph above, except for 2020, the Applicant did not lose sales volumes, and an isolated development in the IIP is not sufficient to claim injury.

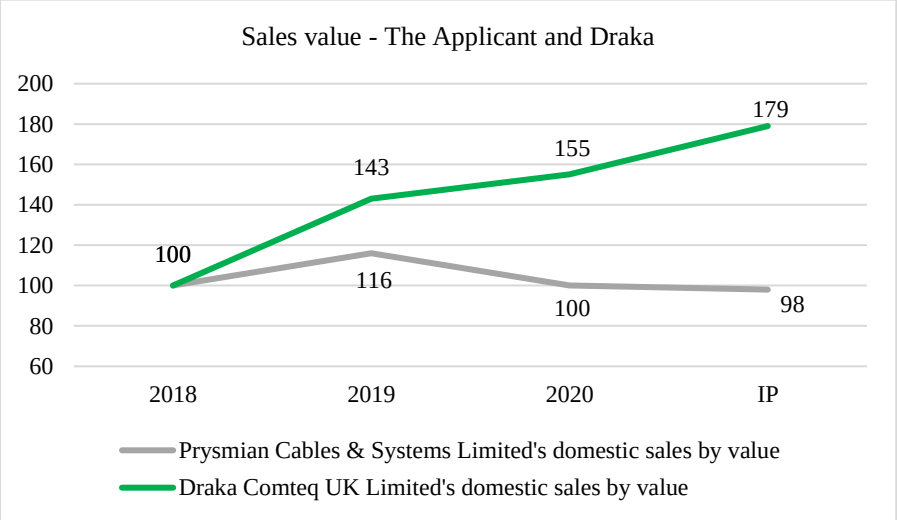
77. In this context, the CCCME recalls that, in *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, the Panel found that Morocco had acted inconsistently with Article 3.1 ADA by limiting its analysis to a one-year period of the IIP:

> "*We note that the title of Article 3 "Determination of Injury" and the wording of Article 3.5 ("[i]t must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement") confirm that consideration of price effects is one of the steps in the determination of injury. As Tunisia recalls, this inquiry is part of a "logical progression ... leading to an investigating authority's ultimate injury and causation determination". Therefore, in order to determine whether imports cause, through the effects of dumping (including price effects) injury, the effects analysed must, in principle, relate to the period selected for the examination of the economic situation of the domestic industry.*
>
> *[…]*
>
> *We note that, because it limited itself to a one-year period, MIICEN did not consider the evidence of the interaction between domestic and import prices over the period of four years and four months that had been placed on the record. Moreover, those data indicated that the price of imports was higher than the price of*

[…]

We consider that the requirements of Article 3.1 mean that an investigating authority is obliged to ensure that the data on which it bases its injury determination accurately and credibly reflect the state of the domestic industry." [38] (Underlining added and footnotes omitted).

78. Last, although, based on the Injury Annex, the value of the Applicant's sales seems to have remained stable during the IIP, the value of Draka's sales – which is also part of Prysmian UK Group[39] – increased by 79% throughout the IIP.

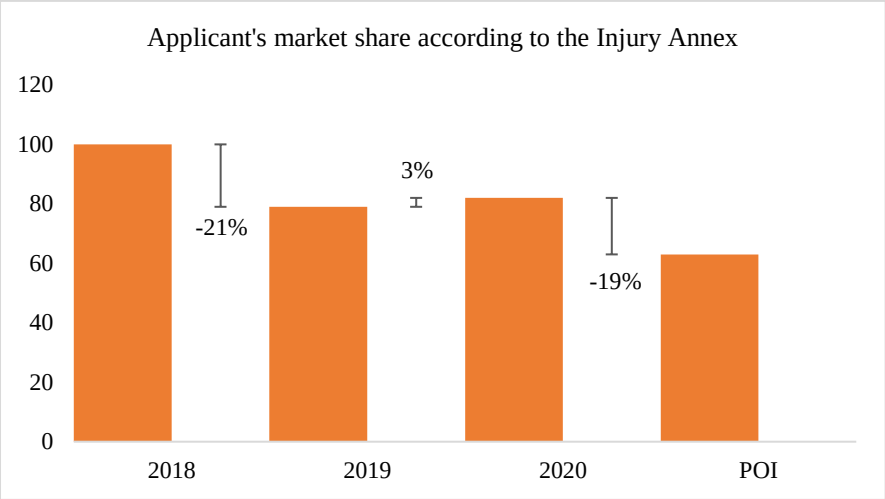


79. In summary, the sales of all UK producers of OFC show a positive trend and were not affected by the Chinese OFC imports. Prysmian UK's sales also do not show negative developments, and the Chinese imports of OFC could not have been the explanatory force for any injury claimed.

3.2.2 Market share

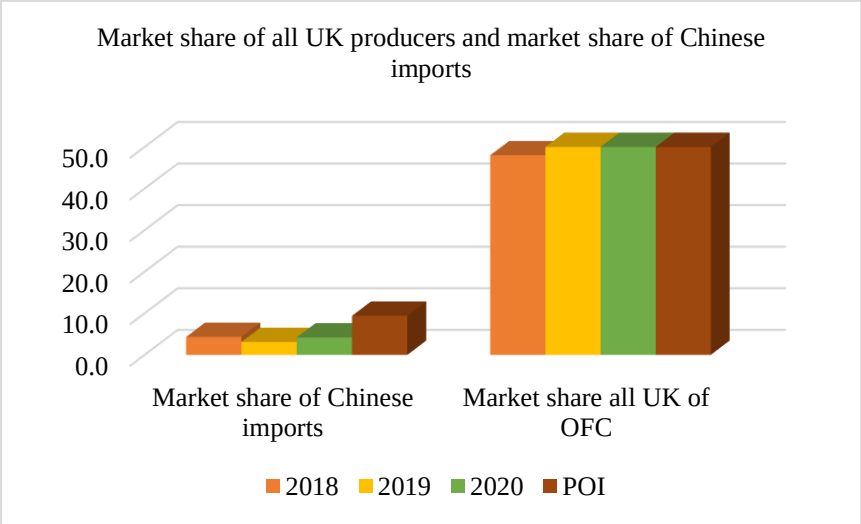
80. To the extent that the market share data in the Injury Annex is reliable, as shown in the graph below, the Applicant lost most of its market share (*i.e.*, 21%) in 2019, when the imports of OFC from China were at their lowest and also lost market share.

[38] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia) (DS578)*, paras 7.216, 7.217, 7.220 and 7.289.
[39] Applicant's ADQ Replies, Annex A.3.2.



81. The imports of OFC from China, therefore, did not have the explanatory force for the Applicant's loss of market share.

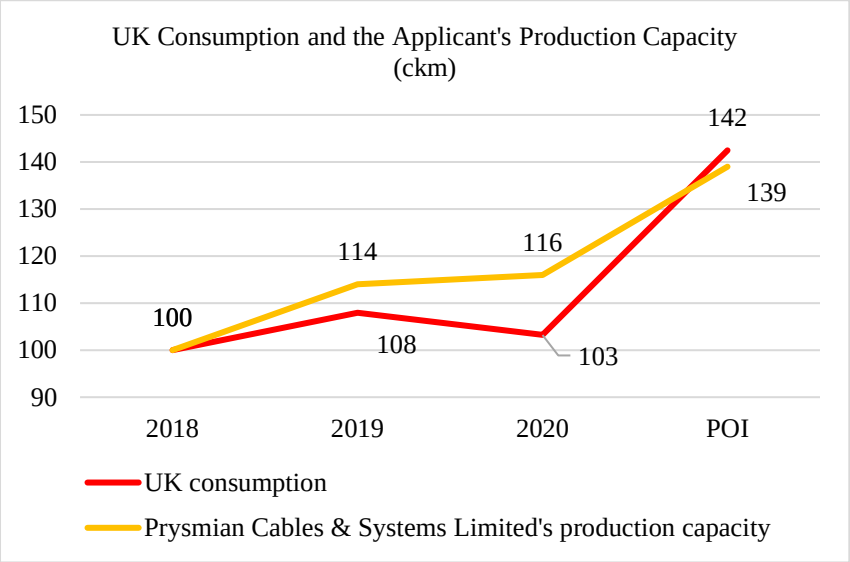
82. Moreover, as shown in the graph below, the market share of all UK producers of OFC increased throughout the IIP notwithstanding the imports of OFC from China which indicates that the Applicants lost market share to other UK producers whether or not part a of the domestic industry. Without an assessment of this issue, the Applicant's claim cannot be accepted.



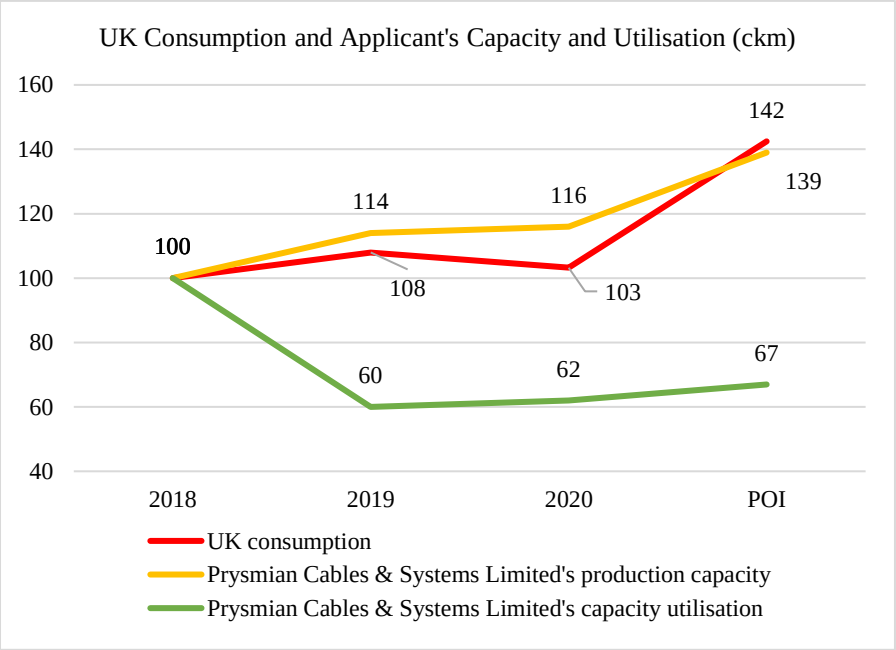
83. Thus, given that information concerning the sales and market share of all UK producers is available, the CCCME trusts that the TRA will carefully consider this factor.

3.2.3 Production Capacity, Production and Capacity Utilisation

84. The fact that the Applicant was able to increase its production capacity by 39% during the IIP and by 23% during the POI is, in itself, an indication that the Applicant is not suffering any injury and was not injured between 2018-2021. Most importantly, the CCCME notes that the Applicant increased its production capacity well beyond the level of increase in the UK OFC demand between 2018 and 2020.

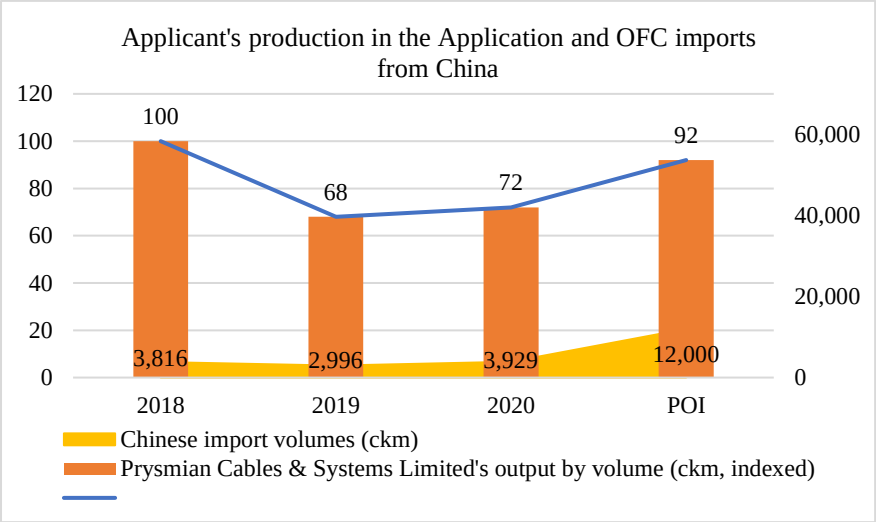


85. In any event, the Applicant's capacity utilisation dropped only in 2019, *i.e.*, when imports from China also declined and were at the lowest level in the IIP. Since 2019, as shown in the graph below, the Applicant's capacity utilisation has consistently increased, *i.e.*, by 2% in 2020 and by further 5% during the POI, *i.e.*, when imports from China allegedly increased. Therefore, again, the Chinese OFC imports could not have been the explanatory force for the reduction in the Applicant's capacity utilisation in 2019.



86. This having been said, the CCCME recalls that the production data in the Injury Annex contradicts both the TRA's Verification Report and the data contained in the Application.[40] If, as the TRA's Verification Report suggests, the production data provided in the Application is correct, then the Applicant's production increased by 20% during the POI, *i.e.*, when the Chinese OFC imports allegedly increased. Therefore, there is no correlation between the alleged injury and the Chinese imports, implying that the OFC imports from China could not have been the explanatory force for the supposedly lower production of the Applicant. Indeed, it cannot be overlooked that the other UK OFC producers were performing well and the intra-UK producer competition would have affected the sales and consequently the production of the Applicant.

[40] See Section 2.3.1 above.

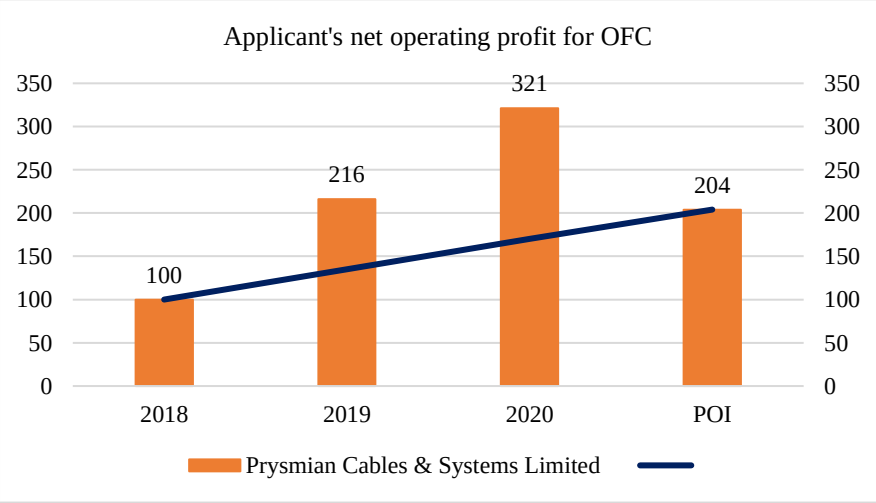


87. In summary, neither the decline in the Applicant's capacity utilisation nor the Applicant's inconsistent data regarding production indicate that the OFC imports from China had any explanatory force on the injury allegedly suffered by the Applicant.

3.2.4 Profit and Extraordinary Costs

88. The Applicant alleges that its profitability "*decreased by nearly [5-15] points from its peak in 2019.*"[41] In this connection, the CCCME has five observations.

89. First, the Applicant's net profits for OFC grew considerably throughout the IIP, showing an overall increase of 104% as illustrated in the graph below.

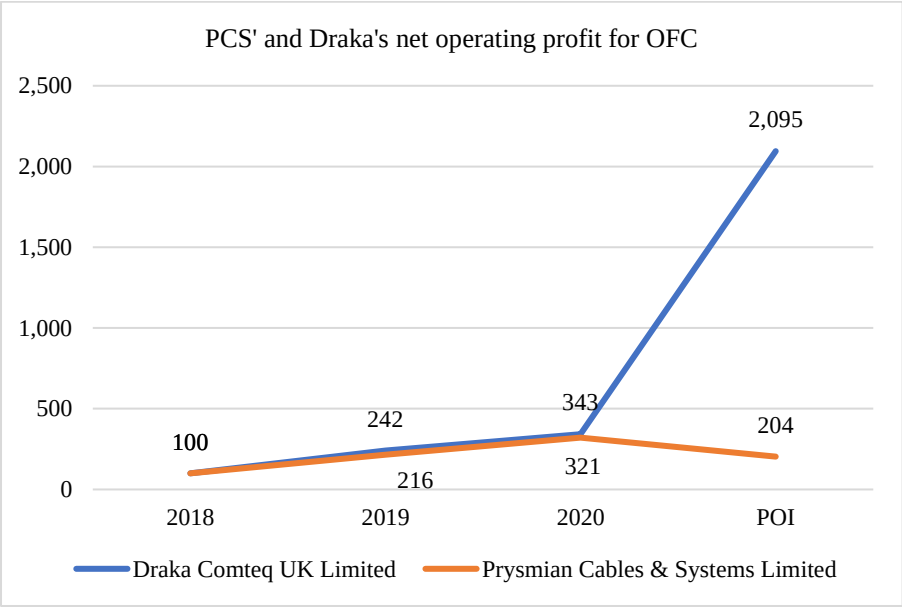


[41] Applicant's ADQ Replies, p. 34; and Applicant's ASQ Replies, p. 36.

90. Second, according to the Applicant, its profitability started declining in 2019. Considering, however, that the imports of OFC from China decreased in 2019 and increased only in 2021, there is no correlation between the decline in the Applicant's profitability and the Chinese OFC imports, and the latter were clearly not the explanatory force for the reduction in the Applicant's profitability.

91. Moreover, as noted by the Panel in *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, Morocco had "*failed to examine in an objective manner whether the subject imports had "explanatory force" for the negative profitability of the domestic producers*", as it had (i) failed to consider the interaction among the domestic prices, the export prices and the costs of production of the domestic like product and (ii) failed to explain why, in view of the upward trend in the prices of the Tunisian product, the domestic industry was forced to continue lowering its prices, thereby sacrificing its profits.[42]

92. Third, as shown in the graph below, Draka's net operating profit for OFC skyrocketed in 2021.



93. Fourth, the Applicant replied "N/A" to the TRA's question as to whether the Applicant had incurred "any extraordinary costs" during the POI.[43] However, as noted in the Initial Comments,[44] the Applicant "*reported exceptional costs of £0.7m (2020 £8.5m) in 2021, [including]*

[42] Panel Report, *Morocco – Definitive AD Measures on Exercise Books ((Tunisia) (DS578)*, paras 7.306 - 7.307.
[43] Applicant's ADQ Replies, p. 25; and Applicant's ASQ Replies, p. 27.
[44] CCCME's AS Initial Comments of 5 August 2022, Section 4.2.6; and CCCME's AD Initial Comments of 5 August 2022, Section 5.2.6.

a further provision related to the anti-trust legal claim in the year of £(0.5)m (2020: £6.3m)."[45] This explains both the Applicant's decrease in net operating profit as well as the decrease in the Applicant's average net operating profit margin in 2021.

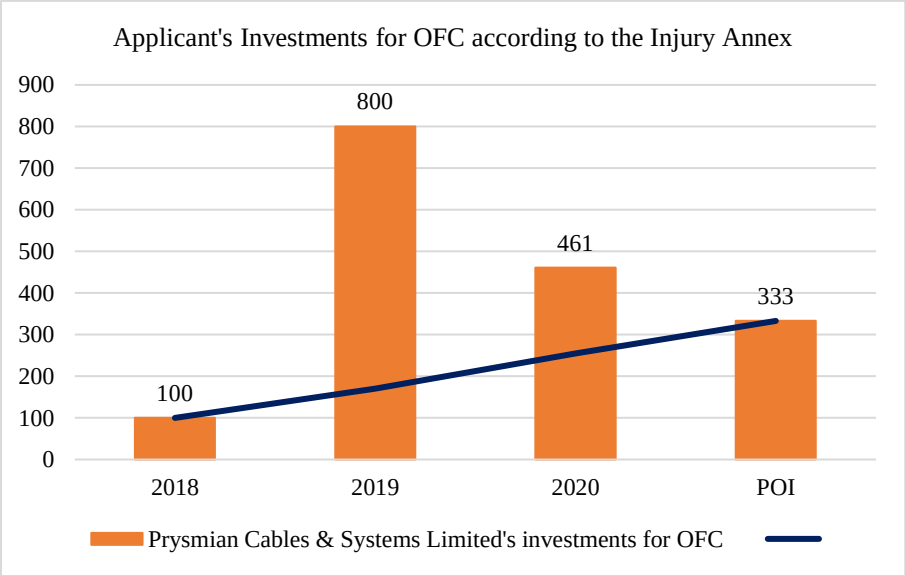
94. Fifth, as noted in the Initial Comments,[46] the Applicant's target profit of 20% is unrealistic. Indeed, according to the indexed data in the Application, the Applicant never reached this profitability level, including when the Chinese OFC imports were almost inexistent.[47] Furthermore, the Applicant's target profit is even much higher than the target profit that the European Commission had considered appropriate for the sales of the EU OFC producers in the context of its OFC investigation.[48]

95. In this context, the CCCME recalls that, as confirmed by the Panel in *Pakistan – BOPP Film (UAE)*, an investigating authority has to consider whether the domestic industry would be able to reach the profitability levels claimed by the complainants.[49] Thus, it cannot just be assumed that, but for the OFC imports from China, the Applicant's net operating profit margin would have been 20%.

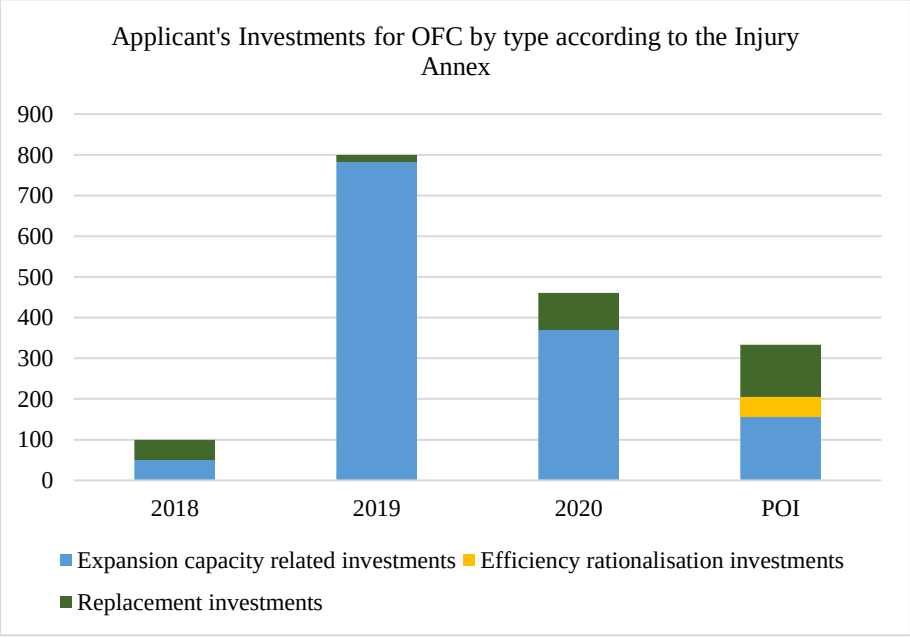
3.2.5 Investments and Return on Investments

96. As also confirmed by the TRA's Verification Reports,[50] the Applicant made massive investments in 2019. In 2020, the Applicant invested less, but still 361% more than in 2018. This decline was most likely caused by the outbreak of the COVID-19 pandemic, which triggered the largest global economic crisis in more than a century. Likewise, during the POI, the Applicant's investments exceeded the investments made in 2018 by 233%. Thus, this factor is not indicative of injury.

[45] Applicant's ADQ Replies, Annex A.6.3.a, p. 5 (p. 3 of the Annual Report).
[46] CCCME's AD Initial Comments of 5 August 2022, Section 4.2.5; and CCCME's AS Initial Comments of 5 August 2022, Section 3.2.5.
[47] Application, p. 145.
[48] Commission Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China [2021] OJ L410/51, p. 139-140.
[49] Panel Report, *Pakistan – BOPP Film (UAE) (DS538)*, paras. 7.370 – 7.383.
[50] TRA, AS and AD Verification Reports p. 14.



97. As regards the Applicant's return on investments, the CCCME respectfully reiterates that the indexation provided in the Injury Annex is not at all clear. Nevertheless, as shown in the graph below, it is clear is that the Applicant made *almost all its investments* to increase its production capacity.



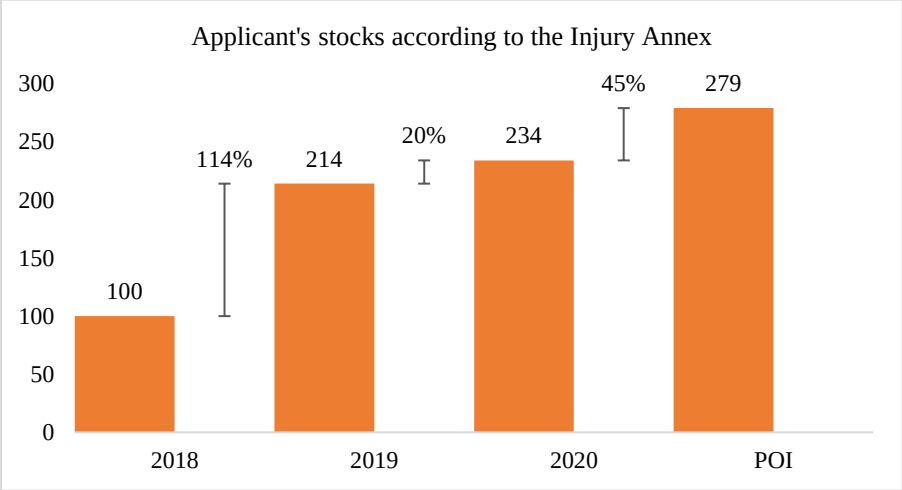
98. Since, as noted above, the Applicant increased its production capacity well beyond the level of increase in the UK OFC demand, it would not be surprising that its return on investments were low or negative during the IIP. Moreover, the Applicant does not mention the time lag between the increase in production capacity and the actual ramping up of the production, which would also affect the actual production.

3.2.6 Cash flow

99. As confirmed by the TRA's Verification Reports, the Applicant's net cash flow for the like product remained positive throughout the IIP.[51] This further indicates that the Applicant is not injured.

3.2.7 Stocks

100. According to the Injury Annex, the Applicant's stocks increased throughout the IIP. However, as shown in the graph below, stocks increased by 114% between 2018 and 2019, *i.e.*, when the OFC imports from China decreased and were at their lowest.



101. In any event, the CCCME respectfully submits that, as found by the European Commission in the context of the AD investigation concerning imports of OFC from China, "*given that the majority of the production takes place based on orders and customers specifications, inventories do not constitute a main indicator of injury*."[52]

3.2.8 Employment

102. The employment for the production of OFC at the Applicant's premises increased by 7% in the IIP, and by 8% during the POI alone. This indicates lack of injury, and the Applicant's assertion that the "*increase is far below the 42% increase in UK consumption*"[53] is not logical. There is

[51] TRA, AS Verification Report, pp. 14-15; and TRA, AD Verification Report, pp. 14-15.
[52] Commission Implementing Regulation (EU) 2021/2011 of 17 November 2021 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China [2021] OJ L410/51, recital (483).
[53] Application, p. 144.

no direct correlation between the increase in demand and employment and none has been established by the Applicant. Moreover, the CCCME recalls that imports from China allegedly increased in 2021, when the Applicant managed to increase its workforce to levels that it had never reached before. Therefore, the Applicant's claim that it was "*unable to expand its workforce mainly due to the significant increase in the volume of Chinese imports over the same period*"[54] is factually incorrect.

3.3 Interim conclusion on injury

103. In summary, the CCCME respectfully submits that the injury data provided by the Applicant in the course of the present proceeding does not constitute "positive evidence" and cannot form the basis for an "objective examination" within the meaning of Article 3.1 ADA and Article 15.1 SCMA.

104. Furthermore, and without prejudice to the above, there is no basis for concluding that the domestic industry suffered any material injury because (i) the data available in the public file concerning sales, market share, profits, investments, cash flow, and employment shows positive trends; and (ii) to the extent that the other injury factors declined, the Chinese OFC imports were not the explanatory cause for their decline. The non-confidential versions of the Applicant's questionnaire responses do not include data on all the injury factors listed under Regulation 33 basic Regulations and there is no information regarding the Applicant's prices. Therefore, the CCCME was not able to provide meaningful comments on issues concerning these factors.

4 COMMENTS ON CAUSATION

105. According to Regulation 35 basic Regulations:

> "*(1) For the purposes of [determining whether the dumped or subsidised imports caused injury to the UK domestic industry], the TRA must examine whether any known factors other than the dumped goods or subsidised imports ("other known factors") have caused or are causing injury to a UK industry."*
>
> *(2) Injury caused by other known factors must not be attributed to the dumped goods or subsidised imports.*
>
> *(3) For the purposes of paragraph (2), other known factors may include:*

[54] *Ibid*.

> *(a) the volume and the prices of imports that are not dumped or subsidised into the [UK];*
> *(b) contraction in demand or changes in the pattern of consumption of the like goods in the [UK];*
> *(c) trade restrictive practices of and competition between the overseas exporters and the UK industry;*
> *(d) developments in technology; and*
> *(e) the export performance and productivity of the UK industry*."

106. Regulation 35 basic Regulations encompasses the requirements of Article 3.5 ADA and Article 15.5 SCMA. Thus, the determination of injury involves (i) determining that the dumped or subsidised imports caused injury to the UK industry; and (ii) conducting a non-attribution analysis to ensure that injury caused by other known factors is not attributed to the dumped or subsidised imports.[55]

107. According to well-established WTO jurisprudence, the determination of a "causal link" between the allegedly dumped/subsidised imports and the alleged injury to the domestic industry is "*fundamental to the imposition and maintenance of an anti-dumping [and/or countervailing] duty*."[56] This determination "*shall be based on an examination of all relevant evidence*"[57] and requires the authorities to demonstrate that the subsidised imports caused injury to the domestic industry "*through the effects of subsidies*", as set forth in Articles 3.2 and 3.4 ADA and/or Articles 15.2 and 15.4 SCMA.[58]

108. In this connection, the Appellate Body held that:

> "*The use of the phrase "as set forth in paragraphs 2 and 4" in Article 3.5 makes it clear that "proper assessment[s]" under Articles 3.2 and 3.4 are "necessary building block[s]", which "contribute[] to", rather than replicate, the "overall determination" of injury and causation that is required under Article 3.5. The first sentence of Article 3.5 thus suggests that these "building blocks" form part of and are "linked through a causation analysis between subject imports and the injury to the domestic industry, taking into account all factors that are being considered and evaluated". In requiring a "demonstrat[ion] that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury", the causation inquiry under Article 3.5 calls for a holistic assessment by an investigating authority that links together the considerations under Article 3.2 and the examination conducted under Article 3.4 in order to reach a definitive determination regarding the existence of a causal relationship between dumped imports and injury to*

[55] See, for example: Panel Report, *EC – Countervailing Measures on DRAM Chips (DS299)*, para. 7.397.
[56] See, for example: Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods (DS282)*, para. 117.
[57] Appellate Body Report, *Korea – Pneumatic Valves (Japan) (DS504)*, para. 5.189.
[58] See the text of Articles 3.5 ADA and 15.5 SCMA and Appellate Body Report, *Korea – Pneumatic Valves (Japan) (DS504)*, para. 5.190.

> *the domestic industry. In this context, the inquiries under Articles 3.2 and 3.4 "should not be viewed in isolation", as they are "necessary components" and form part of the "logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination*".
>
> *The use of the word "demonstrate[]" in Article 3.5 in contrast to the words "consider" in Article 3.2 and "examination" in Article 3.4 indicates that Article 3.5 establishes a standard that is distinct from Articles 3.2 and 3.4, inasmuch as Article 3.5 is concerned with the establishment of the causal link between dumped imports and injury. […] The use of the phrase "all relevant evidence" means that Article 3.5 covers a broad basket of evidence that encompasses, and is not limited to, the evidence relating to the inquiries under Articles 3.2 and 3.4. This suggests that Article 3.5 has a broader scope of examination than Articles 3.2 and 3.4.*"[59] (Underlining added and footnotes omitted).

109. The Appellate Body further held that:

> "*A coincidence in time between upward trends in imports and a decline in the performance indicators of the domestic industry could be evidence of the existence of a causal link between increasing imports and material injury to the domestic industry. However, while such a coincidence, by itself, cannot prove causation, its absence would create serious doubts as to the existence of a causal link and would require a very compelling analysis of why causation is still present. Thus, the existence of a correlation, though indicative, is by no means dispositive of the existence of a causal link.*"[60] (Underlining added).

110. In the present case, the Applicant asserts that "*the existence of a causal link […] is demonstrated by the fact that injury occurred at the same time as dumped imports from China flooded into the UK market*." [61] In this connection, the CCCME wishes to make three points.

111. First, for the reasons given in Section 3.1 above, the injury data submitted by the Applicant likely does not constitute "positive evidence" and cannot form the basis for an "objective examination" of the impact of the allegedly subsidised imports on the UK industry, as required under Article 3.1 ADA and Article 15.1 SCMA.

112. Second, and without prejudice to the above, the key injury indicators (e.g., production capacity, sales, market share of all UK producers, profits, investments, cash flow, and employment) developed positively over the IIP. Moreover, the few injury factors that showed a negative trend during the IIP (e.g., capacity utilisation, production, market share of the Applicant and stocks)

[59] Appellate Body Report, *Korea – Pneumatic Valves (Japan) (DS504)*, paras. 5.191-5.192. See also: Appellate Body Report, *China – GOES (DS414)*, paras. 128 and 149; and Appellate Body Report, *China – HP-SSST (Japan) (DS454)/ China – HP-SSST (EU) (DS460)*, para. 5.141.
[60] Appellate Body Report, *Korea – Pneumatic Valves (Japan) (DS504)*, para. 5.291.
[61] Applicant's ADQ Replies, p. 38; and Applicant's ASQ Replies, p. 40.

started declining prior to the alleged increase in imports of OFC from China (i.e., 2021 only). Therefore, contrary to the Applicant's unsubstantiated assertions, and as discussed in Section 3.2 above, there seems to be no temporal correlation between the injury allegedly suffered by the domestic industry and the alleged increase in the dumped and subsidised OFC imports from China. This further reinforces the fact that the Chinese OFC imports were not – and, in fact, could not have been – the cause of injury (if any was suffered by the UK industry at all).

113. Third, in any event, even if there was a temporal correlation between the Chinese OFC imports and the injury that the Applicant claims to have suffered, such a correlation would "*by no means [be] dispositive of the existence of a causal link*."

114. The Applicant also asserts that "*there are no other factors that could break the causal link between the imports of the product concerned from China and the material injury suffered by the Complaining UK Industry*."[62] The CCCME disagrees with this assertion and hereby incorporates by reference the arguments developed in Sections 5.2 and 4.2 of its AD Initial Comments and AS Initial Comments respectively. In addition, the CCCME wishes to make the observations noted below.

4.1 Intra-UK producer competition

115. As noted in the preceding section, the intra-UK producer competition is clearly another causal factor that negatively affected the Applicant throughout the IIP.

116. According to the Applicant, the UK market for OFC "*is extremely competitive: there are multiple sources of supply within the UK (several producers)*".[63] This proves that the other UK OFC producers are in competition with the Applicant. Moreover, based on the Injury Annex, the Applicant incurred its biggest market share loss (*i.e.*, 21%) between 2018 and 2019. In the same period, "all UK producers" gained market share, while the OFC imports from both China and other third countries lost market share. This demonstrates that OFC imports from China could not have gained market share at the expense of the Applicant in the first year of the IIP. In fact, the loss of sales and market share is clearly attributable to the other UK OFC producers.

[62] Applicant's ADQ Replies, p. 38; and Applicant's ASQ Replies, p. 40.
[63] Applicant's ADQ Replies, p. 21; and Applicant's ASQ Replies, p. 23.

117. Importantly, during the POI, the market share of third country imports fell from 45.8% to 40.6%, *i.e.*, showing a decline of 5.1%. This 5.1% drop corresponds in terms of both magnitude and timing to the market share gained by OFC imports from China. Therefore, this indicates that, to the extent that the OFC imports from China gained market share, this was at the expense of the third country imports, not the Applicant or other UK producers. Indeed, the other UK producers did not join the Applicant and have not claimed injury on account of the Chinese OFC imports.

118. These facts are very similar to those in *China – Autos (US)*, where the Panel held:

> "*[T]he record shows that the domestic industry lost market share in 2007 mostly to Chinese producers not part of the domestic industry. This data also indicates that subject imports and the domestic like product gained market share mostly from third country imports in the interim 2009 period. Thus, in our view, the evidence before MOFCOM clearly shows that the market shares of Chinese producers not part of the domestic industry and third country imports during the POI were relevant to MOFCOM's analysis of causation. Yet, the final determination contains no discussion of the role of Chinese producers not part of the domestic industry or their market share in connection with the analysis of causation. In our view, the absence of such a discussion requires us to conclude that MOFCOM's analysis of the causal relationship between subject imports and injury to the domestic industry was not reasoned and adequate.*
>
> *Regarding third country imports, we note MOFCOM's statement in the final determination that the market share of third country imports did not affect its finding of a causal relationship between subject imports and injury to the domestic industry […]. We recall our finding that, in circumstances where market shares varied significantly during the POI, an IA should analyse developments throughout the entire POI. An analysis of market share limited to consideration of starting and ending levels, would not, in our view, constitute an objective examination of the evidence. The concerns we expressed regarding failure to objectively examine the market share evidence in MOFCOM's price effects analysis apply equally to MOFCOM's causation analysis. While MOFCOM concluded that the changes in the market share of third country imports had no bearing on its finding of causation, in our view, this conclusion reflects only consideration of the starting and ending figures, as third country imports accounted for 57.15% of the Chinese automobile market in 2006 and 57.40% in the interim 2009 period. For this reason, we conclude that MOFCOM's finding that third country imports had no bearing on MOFCOM's causation analysis lacks an adequate basis on the record and is not based on an objective examination of positive evidence.*
>
> *On the basis of the foregoing, we consider that MOFCOM's finding of the causal relationship between subject imports and injury to the domestic industry was not reasoned and adequate*."[64] (Underlining added and footnotes omitted).

[64] Panel Report, *China – Autos (US) (DS440)*, paras. 7.331-7.335.

119. Likewise, in *EU – PET (Pakistan)*, the Panel found that the European Commission had acted inconsistently with Article 15.5 SCMA with respect to its analysis of competition from non-cooperating producers because "*the increase in market share of the non-cooperating producers […] warranted more specific examination*."[65] In that case, the Panel noted that: (i) "*the magnitude of the rise in market share of non-cooperating producers […] was, at least in absolute terms, similar to the drop in market share the Commission observed pursuant to the end-point-to-end-point analysis*" (*i.e.*, the drop in market share of the domestic industry as a whole); (ii) the rise in market share of the non-cooperating producers coincided with, *inter alia*, a drop in the market share of the domestic industry; and (iii) "*the domestic industry's loss of market share during the period considered was a significant consideration in the Commission's finding that the domestic industry had suffered injury*." [66]

120. In this connection, the CCCME notes that the intra-UK producer competition is also relevant to assess the development of other injury factors concerning the Applicant, such as capacity utilisation, output levels, profitability, and employment which, just like the Applicant's market share, dropped between 2018 and 2019, *i.e.*, when OFC imports from China decreased while "all other UK producers" increased their market share. The same is true for the Applicant's stocks, which as noted in Section 3.2.7 above mainly increased between 2018 and 2019.

121. In light of the above, the CCCME trusts that the TRA will carefully consider whether the Applicant suffered any injury due to the intra-UK producer competition within the context of its non-attribution analysis.

4.2 COVID-19 pandemic

122. As acknowledged by both the Applicant itself and the Applicant's Group Company (*i.e.*, the Prysmian Group), the COVID-19 pandemic "*had unprecedented negative impacts [and] severe repercussions [on] the entire manufacturing system*."[67] The pandemic, therefore, evidently was another causal factor that adversely affected the Applicant in 2020 and 2021.

[65] Panel Report, *Korea – Pneumatic Valves (DS504)*, para. 7.381.
[66] Panel Report, *EU – PET (Pakistan) (DS486)*, paras. 7.150-7.152.
[67] Prysmian Group, "Press release results at 31 December 2020", available at <www.prysmiangroup.com/en/media/press-releases/press-release-results-at-31-december-2020>. See also, Prysmian UK's Annual Report 2020, Annex A.6.3.a (2020) to the Applicant's ADQ Replies, p. 2 (*i.e.*, p. 4 of the PDF document).

123. This is also clear from the data trends analysed in Section 3.2 above, which show a correlation between the outbreak of the health crisis and the "negative" developments in the Applicant's sales, profitability, and investments. These factors, indeed, showed a decline in 2020 compared to 2019, *i.e.*, when the pandemic spread in Europe.

124. Moreover, the COVID-19 pandemic caused substantial supply-chain disruptions due to the restrictive measures taken by governments worldwide. The pandemic, therefore, is most likely to have impacted also the Applicant's production and capacity utilisation.

125. This means that, to the extent that the Applicant claims a decline in production, capacity utilisation, sales, profitability, and investments, the negative effects of the health crisis must be taken into consideration and segregated from those of the OFC imports from China.

126. In this context, the CCCME recalls that, in *Pakistan – BOPP Film (UAE)*, the Panel found that Pakistan had acted inconsistently with the requirements of non-attribution and an objective examination based on positive evidence by providing merely "*a bare assertion that the trends in the size of the domestic market showed the financial crisis had not affected the domestic industry*" and by failing "*to identify – let alone separate and distinguish – the injurious effects of the global financial crisis*."[68]

4.3 Brexit and increased costs of raw materials

127. As stated by the Applicant's Group Company on 23 February 2021, during the POI, "*the wire and cable industry [was] facing significant and sustained increases in key material cost inputs used in the manufacturing and distribution of [their] products*."[69] Moreover, as admitted by the CEO of the Applicant,[70] Brexit led to "*costs increasing on the back of a devaluing pound as Prysmian UK purchases most of its raw materials (in Euros) from European suppliers.*"[71] The

[68] Panel Report, *Pakistan – BOPP Film (UAE) (DS538)*, para. 7.450.
[69] Prysmian Group, "Energy Products Price Increase" (23 February 2021), available at <https://na.prysmiangroup.com/sites/default/files/atoms/files/Prysmian-Group_Price-Announcement-_02-23-2020.pdf>.
[70] Prysmian Group, "Staying in the course in the UK", available at <www.prysmiangroup.com/staticres/insight-4-2017-en/global-scenario/staying-the-course-in-the-uk.html>.
[71] Prysmian Group, "Staying in the course in the UK", available at <www.prysmiangroup.com/staticres/insight-4-2017-en/global-scenario/staying-the-course-in-the-uk.html>.

negative effects of Brexit were also acknowledged by the Applicant's Group Company in its latest Integrated Annual Report 2022.[72]

128. Thus, the devaluation of the GBP and Brexit resulting in, among others, increased production costs of the Applicant were additional causal factors the impact of which needs to be carefully considered and distinguished from any effects of the OFC imports from China.

129. In this context it is recalled that in *Pakistan – BOPP Film (UAE)*, the Panel found that Pakistan had acted inconsistently with Article 3.5 ADA by failing to consider other potentially injurious factors that were raised by exporters and cited in the domestic producers' annual reports:

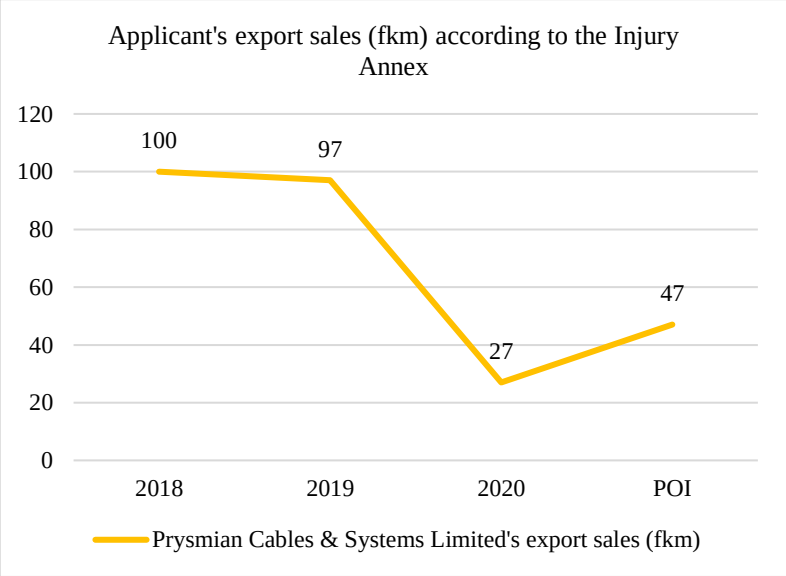
> *"[…] we disagree with Pakistan that Taghleef made "theoretical"/"bare assertions" to the NTC. Taghleef's assertions were supported by evidence – the domestic producer's annual report, where the domestic producer itself identified those other factors. The domestic producer is in the best place to know what factors have injured it. Tri-Pack Films, the domestic producer, enumerated conditions that were harming its business, and did so in its annual report, which is a formal company document. In our view, these statements in the domestic producer's own annual report were sufficient evidence to require the NTC to evaluate whether the factors in question were also injuring the domestic industry.*
> *Pakistan argues that the fact that these statements were reflected in the annual report of the domestic producer cast doubt on their probative value. Pakistan maintains that publicly listed companies like Tri-Pack face different obligations and incentives when preparing their annual reports which "might require the disclosure of certain information to shareholders, including potential but unconfirmed factors that might affect the company's future performance". Thus, Pakistan argues that these circumstances limit the value of annual reports as evidence of other causal factors, especially when presented without any further evidence. This argument misses the point. The question is whether certain factors other than dumped imports were known to the authority to cause injury to the domestic industry. Taghleef raised these factors in the domestic proceedings and referred to the domestic producer's annual report as evidence. The fact that the annual report was not prepared by the domestic producer for purposes of the investigation does not disqualify it as evidence of other factors causing injury to the domestic industry. In our view, in the circumstances of this case, this evidence was sufficient, at a minimum, to warrant a consideration by the NTC."*[73] (Underlining added and footnotes omitted)

[72] Prysmian Group, "Integrated Annual Report 2022", available at <www.prysmiangroup.com/sites/default/files/pr-2302-rsg-2022-integrated-annual-report-compr_1.pdf>, p. 118.
[73] Panel Report, *Pakistan – BOPP Film (UAE) (DS538)*, paras. 7.456-7.457.

4.4 The Applicant's poor export performance

130. The "*export performance and productivity of the UK industry*" is a factor explicitly listed under Regulation 35 basic Regulations and, as such, must be taken into consideration for the purposes of the non-attribution analysis.

131. According to the Applicant's Injury Annex, its export sales decreased substantially throughout the IIP.



132. Thus, to the extent that the Applicant suffered injury (if any), the decline in export sales would have been a contributory factor.

133. In relation to this, the Applicant asserts that "*if adequate measures are imposed, the UK production industry will regain viability and become more productive (notably [through] economies of scale), thereby creating a strong potential to increase its exports to third countries, especially in niche types of the like product*."[74] The CCCME notes that this argument seems illogical. In fact, contrary to what the Applicant asserts, if the OFC imports from China were affecting the UK sales of the Applicant (*quod non*), nothing prevented the Applicant from using its allegedly underutilized capacity to increase its production and sales to third countries.

[74] Applicant's ADQ Replies, p. 51; and Applicant's ASQ Replies, p. 54.

134. Indeed, as noted by the Panel in *Korea – Pneumatic Valves*, "*if the domestic industry's capacity utilization rate is low, the domestic industry could […] increase production to meet both domestic and export demand*."[75] (Underlining added)

4.5 The Applicant's anti-competitive behaviour

135. As noted in the Initial Comments,[76] the Applicant has a tendency to engage in anti-competitive behaviour and has a questionable past. In 2018, the European General Court upheld the European Commission's decision to fine the Applicant's Group Company as part of the high voltage power cables cartel.[77] In 2020, the European Court of Justice dismissed the Applicant's appeal against the judgment of the General Court.[78] The Applicant's Group Company was found to have operated a fixing-price cartel, as it was overcharging power cable supplies for wind farms. In addition, the Applicant was fined for anti-competitive behaviour by other national competition authorities, such as the Brazilian[79] and Spanish[80] authorities.

136. Moreover, on 10 March 2023, the UK Competition Appeal Tribunal issued a Notice of Claim under section 47A of the Competition Act 1990 (Case No. 1532/5/7/22) acknowledging the receipt of a claim for damages against the Applicant.[81] The ground for the claim for damages is the European Commission's decision to fine the Applicant's Group in 2014 which, as discussed above, was upheld by the European Courts.

137. This not only confirms the Applicant's tendency to disregard EU and UK competition rules but also corroborates the argument that the Applicant's past actions are likely to have negatively impacted its reputation and business relationship and market dynamic. The CCCME thus reiterates that companies may be reluctant to engage in business with the Applicant.

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[75] Panel Report, *Korea – Pneumatic Valves (Japan) (DS504)*, para. 7.381.
[76] CCCME's AD Initial Comments of 5 August 2022, Section 5.2.6; and CCCME's AS Initial Comments of 5 August 2022, Section 4.2.6.
[77] Case T-475/14, *Prysmian SpA and Prysmian Cavi e Sistemi Srl v European Commission*, Judgment of the General Court (Eighth Chamber) of 12 July 2018.
[78] Case C-601/18, *Prysmian SpA and Prysmian Cavi e Sistemi Srl v European Commission*, Judgment of the Court (Second Chamber) of 24 September 2020.
[79] See, Brazilian Government, "Cade applies BRL 20.9 million in fines for international cartel of underground and submarine cables" (1 November 2022), available at <www.gov.br/cade/en/matters/news/cade-applies-brl-20-9-million-in-fines-for-international-cartel-of-underground-and-submarine-cables>.
[80] Comision Nacional de los Mercados y la Competencia, Case S/DC/0562/15: CABLES BT/MT, Final Resolution available at <www.cnmc.es/expedientes/sdc056215>.
[81] Competition Appeal Tribunal, Notice of a Claim under section 47A of the Competition Act 1998, Case No.1532/5/7/22; available at <www.catribunal.org.uk/sites/cat/files/2023-03/2023.03.10_1532_RWE%20Renewables%20v%20Prysmian_Summary_of_Claim_Final.pdf>.

138. As confirmed by the Panel in *EC – Countervailing Measures on DRAM Chips*, "*forces that may have caused certain negative or positive developments*" should be considered by investigating authorities within the context of their causation analysis under Article 3.5 ADA and Article 15.5 SCMA.[82] As such, the CCCME submits that the Applicant's proven anti-competitive behaviour clearly constitutes a relevant known factor to be considered under Regulation 35 basic Regulations and should be considered in the causal link analysis.

4.6 Conclusion on causation

139. In summary, the CCCME reiterates its submission that, if the domestic industry suffered injury (*quod non*), it was clearly not due to the Chinese OFC imports. Moreover, contrary to the Applicant's factually incorrect assertions, there are numerous other factors that are most likely to have caused injury to the Applicant during the IIP, and which the TRA should carefully consider within the context of its non-attribution analysis.

5 COMMENTS ON THE ECONOMIC INTEREST TEST

140. Pursuant to Paragraph (3) of Schedule 4 TCBA:

> "*When considering whether the application of an anti-dumping remedy or anti-subsidy remedy is not in the economic interest of the United Kingdom, the TRA or the Secretary of State must –*
> *(a) take account of the following so far as relevant –*
> *(i) the injury caused by the dumping of the goods, or the importation of the subsidised goods, to a UK industry in the goods and the benefit that UK industry in removing that injury,*
> *(ii) the economic significance of affected industries and consumers in the United Kingdom,*
> *(iii) the likely impact on affected industries and consumers in the United Kingdom,*
> *(iv) the likely impact on particular geographic areas, or particular groups, in the United Kingdom, and*
> *(v) the likely consequences for the competitive environment, and for the structure of markets for goods, in the United Kingdom, and*
> *(b) take account of such other matters as the TRA or, as the case may be, the Secretary of State considers relevant*."

141. Against this background, and in consideration of the ADQ/ASQ Replies supplied by the Applicant, the CCCME wishes to make four observations.

[82] Panel Report, *EC – Countervailing Measures on DRAM Chips (DS299)*, para. 7.364.

142. First, as confirmed by the TRA's Verification Reports, the forecasts provided by the Applicant as regards its market share, sale volume and price do not constitute reliable indicators of future performance.[83]

143. Second, the Applicant claims that "*the like product accounts for a major proportion of Prysmian UK's telecom business*."[84] In this regard, as noted in the Initial Comments,[85] the Applicant's UK turnover increased by 23.02% in 2021, when OFC imports from China supposedly caused injury to the Applicant. [86] Moreover, the Applicant made very high profits in 2021 compared to its loss-making situation in 2020.[87] If the like product accounts for such a major proportion of the Applicant's business, it begs the question as to how can the Applicant still claim to be injured?

144. Third, the Applicant recognises that the demand for OFC in the UK is expected to grow "very significantly", and yet it argues that imports should be restricted and "suppliers would not be affected". This is in contradiction to the information provided by the importer Mayflex:

> "*There are already capacity and lead time constraints within the cable supply chain – this can be demonstrated through interviews with altnet and network operators a situation exacerbated by the recent EU finding in favour of the same complaint as has led to this investigation.*
>
> *If the option for UK companies to purchase product produced in PRC becomes economically unviable through punitive tariffs there is a high likelihood of delays to the roll out programme. Existing UK and EU factories cannot meet market demand in the timeframes required at the moment, so removing capacity from the wider supply chain will only worsen the situation, this in turn impacts the UKs competitiveness and attractiveness for business investment and the general public access to fit for purpose internet access.*
> *[…]*
> *Our strong view is that changes to current tariffs and market competition will not benefit the UK in any measurable manner, and will in fact have a negative impact in both time/delivery of BDUK Project Gigabit and to the cost incurred by the government and public to complete this rollout. We also believe the attractiveness of Project Gigabit to Private / Venture Capitalist investors will be reduced if timelines for return on investment are extended due to supply chain capacity constraints, and if returns are reduced through increased costs.*

[83] See: Applicant's ASQ Replies, p. 32 and Annex 10; and TRA, AS Verification Report, p. 3; and TRA, AD Verification Report, p. 3.
[84] Applicant's ADQ Replies, p. 49; Applicant's ASQ Replies, p. 52.
[85] CCCME's AS Initial Comments of 5 August 2022, Section 3.3.5; and CCCME's AD Initial Comments of 5 August 2022, Section 4.2.5.
[86] Applicant's ADQ/ASQ Replies, Annex A.6.3.a, p. 34.
[87] *ibid*, p. 34.

The UK does not need to follow the EU in this case." [88]

145. Fourth, OFC is needed to build fast broadband networks and is therefore of high importance for citizens, businesses and public entities across the UK, who depend on these networks for working, learning, running a business or providing services. The investment made through Building Digital UK is one of the main priorities of the UK Government, which aims to deploy high-technology broadband infrastructure reaching every corner of the UK. OFC imports are thus key for the UK's digital sovereignty.

146. Ultimately, the imposition of measures on OFC imports from China will result in increased costs for end users (*i.e.*, homeowners and business users), who will pay increased amounts for internet/broadband subscriptions. The costs for national projects will also increase, and the general public will bear those increased costs. The public is already suffering from skyrocketing electricity prices and the economic problems, which have rendered life in the UK even more expensive. The general public, therefore, should not be further penalised to allow the Applicant to strengthen its already-dominant position in the UK.

147. The CCCME thus respectfully submits that the economic test, in this case, is not met and that, accordingly, no AD and AS measures should be imposed on OFC imports from China.

6 CONCLUSION

148. For the above reasons, the CCCME hopes that the TRA will terminate the present AD and AS investigations without imposing any measures on imports of OFC from China.

[88] Open file, document "CAS010 Pre-Sampling Questionnaire (Importer) OFC_Mayflex UK Non Confidential", p. 16.